The Register of Copyrights
of the
United States of America

Library of Congress
Department 17
Washington, D.C. 20540

(202) 707-8350

August 30, 1995

Dear Mr. Malamud:

This is in response to your letter inquiring whether the Internet Multicasting Service (IMS) qualifies for a compulsory license under section 118 of the Copyright Act, and your concerns about BMI's licensing practices.

As you know, a compulsory license is a license that the law says the copyright owner must give the user so long as the government–set rate is paid and all other terms are observed. There are very few compulsory licenses in the law, because, the general rule, as stated in the Constitution, is that the copyright owner is entitled to the exclusive use of his or her copyright and does not have to license anyone.

Congress created the cable and public broadcasting compulsory licenses in 1976 for the stated reason that transaction costs – the cost of negotiating licenses cable system by cable system or public broadcasting station by public broadcasting station – were so high that a compulsory license was to everyone's benefit. It would bring a willing seller and a willing buyer together at sharply reduced costs.

Congress tied the definition of a public broadcasting station to the FCC's definition of a noncommercial education broadcast station. As you state in your letter, IMS does not qualify under that definition. Therefore, IMS does not qualify for a section 118 compulsory license and the Copyright Office is without the authority to change this. That is up to Congress.

Further, as we explained above, a compulsory license is an exception and a derogation of the rights of copyright owners. Therefore, the applicable rules of statutory construction state that exceptions are to be interpreted narrowly; this would rule out the kind of broad interpretation of section 118 you are requesting.

In addition, even examining the question on a policy basis, the stated reason for granting public broadcasting stations a compulsory license was the question of transaction costs. The Copyright Office at the time of the passage of the 1976 Copyright Act agreed that transaction costs were a problem for the cable industry, but did not agree they were a problem for public broadcasting. Similarly, after the public broadcasting compulsory license was established by Congress, the Copyright Royalty Tribunal, which was the agency responsible for setting the public broadcasting rates, recommended to Congress that the license be abolished because the Tribunal did not see the problem of transaction costs that Congress saw.

dir:r:\bc\malamud.ims
August 30, 1995

Congress has not agreed with the recommendations of the Copyright Office and the Copyright Royalty Tribunal and has kept the public broadcasting compulsory license, even though PBS and NPR regularly reach negotiated licenses with ASCAP, BMI and SESAC and their transaction costs are not an impediment. Similarly, in your case, you are one organization negotiating with a few performing rights societies. There is not in your case, the multitude of transactions that there are for the cable industry.

With regard to your concerns about BMI's licensing practices, the Copyright Office does not have the authority to get involved in complaints about the performing rights societies. As you know, BMI is now subject to a federal rate court in the Southern District of New York. I believe that BMI has already indicated to you that they would issue a license to IMS.

Sincerely,

Marybeth Peters

Marybeth Peters
Register of Copyrights

Carl Malamud
The Internet Multicasting Service
Suite 1155
The National Press Building
Washington, D.C. 20045

dir:r:\bc\malamud.ims
August 30, 1995